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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket No. 99-295

Dear Ms. Salas:

Over the past several weeks, the Competitive Telecommunications Association ("CompTel") has held discussions with various FCC Commissioners and personnel regarding the pending Section 271 application by Bell Atlantic for Commission approval to enter the in-region interLATA market in New York. During those discussions, the issue has arisen whether Bell Atlantic was in full compliance with Section 251(c)(3) and the Commission's rules implementing that provision when it filed the application on September 29, 1999. As CompTel has demonstrated at length in its comments, the Commission should not grant the application without receiving adequate advance assurances from Bell Atlantic that it will comply fully with the terms of the Commission's recent decisions in CC Docket No. 96-98. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, rel. Nov. 5, 1999 (*Third Report and Order*); CompTel Comments, filed Oct. 19, 1999, at 10-16. Despite the justified focus on that issue, CompTel is concerned that an equally serious issue may not be receiving sufficient consideration from the Commission. That issue is whether Bell Atlantic's provision of unbundled network elements ("UNEs") throughout 1999 and prior to its pending application was fully consistent with Section 251(c)(3) of the Telecommunications Act of 1996 and with the Commission's rules implementing that provision, which were in full force and effect when Bell Atlantic filed the application. Although CompTel and other parties addressed that issue at length in their comments, CompTel wants to make certain that the record shows that this issue was squarely and fully presented to the Commission in this proceeding.

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Section 271(d)(3) provides that the Commission shall not grant an application unless, among other things, it finds that the applicant has "fully implemented" the competitive checklist, which requires in Section 271(c)(2)(B)(ii) that the applicant provide "[n]on-discriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Further, it is undisputed that the applicant must present "actual evidence" demonstrating "present compliance" with the statutory requirements before the application may be granted. *E.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan,* 12 FCC Rcd 20543, ¶ 55 (1997). An applicant's mere intention to come into compliance with such requirements in the future is patently inadequate to support grant of the application. *Id.* at ¶ 49.

The record in this proceeding shows that Bell Atlantic was in violation of Section 251(c)(3), as well as several Commission rules implementing that provision, as of September 29, 1999. The Commission rules that Bell Atlantic was violating (and which it continues to violate today) include the following: (1) the requirement in Section 51.307(a) that it provide non-discriminatory access to UNEs on terms and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of its interconnection agreements, the Commission's rules, and the statute; (2) the requirement in Section 51.307(c) that requesting carriers are allowed to use a UNE alone or in UNE combinations to provide "any telecommunications service that can be offered by means of that network element"; (3) the prohibition in Section 51.309(a) against imposing any "limitations, restrictions, or requirements on requests for or the use of UNEs to impair a carrier from offering any service in the manner that it desires; and (4) the prohibition in Section 51.315(b) against separating requested UNEs that it currently combines. *E.g.,* Comments of Excel Communications, Inc., filed Oct. 19, 1999, at 4-5; Comments of CompTel, filed Oct. 19, 1999, at 6-10.

As regards these rules, it bears emphasis that all were in full force and effect when Bell Atlantic filed its application on September 29, 1999. Moreover, the first three rules have been in full force and effect since the Commission first implemented Section 251(c)(3) in August, 1996. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996).

These Commission rules apply to UNEs provided by Bell Atlantic pursuant to interconnection agreements in New York, regardless of whether the provision of such UNEs was mandated by Section 51.319 at the time. Initially, there can be no doubt that Section 251(c)(3) and the above-referenced Commission rules would apply to the provision of UNEs by Bell Atlantic even if the Commission had never adopted a rule identifying mandatory UNEs. Section 251(c)(1) states that an incumbent LEC must negotiate in good faith an interconnection agreement with a requesting carrier for UNEs, and Section 251(c)(3) expressly applies to any UNEs provided by an incumbent LEC pursuant to interconnection agreements.[1] Further, Section

[1] It bears emphasis that the definition of "network element" in 47 U.S.C. § 153(29) is not limited to mandatory UNEs under the Commission's rules. Rather, that term broadly refers to any network element provided by an ILEC, whether required by regulations or negotiated as part of an interconnection agreement.

51.307(a) of the Commission's rules makes clear that an incumbent LEC has an obligation to provide UNEs pursuant to interconnection agreements that are just, reasonable, and non-discriminatory in accordance with Section 251(c)(3). As a result, even though Section 51.319 has been vacated for several months during 1999 pursuant to the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), Bell Atlantic has been obligated throughout 1999 to negotiate in good faith interconnection agreements for the provision of UNEs, both alone and in combinations, in accord with Section 251(c)(3). Further, the UNEs provided by Bell Atlantic to requesting carriers in 1999 pursuant to interconnection agreements have been, and continue to be, governed by Section 251(c)(3) and the above-referenced Commission rules.

This is not a situation where the UNEs provided by Bell Atlantic to new entrants in New York over the past year are exempt from Section 251(c)(3) because they were the result of "voluntary" negotiations between Bell Atlantic and new entrants within the meaning of Section 252(a). Bell Atlantic has included the relevant UNE terms and conditions in a tariff filed with the New York Public Service Commission. Further, the UNE provisions in those tariffs, and in Bell Atlantic's interconnection agreements with new entrants, were established under the auspices of generic proceedings conducted by the state regulator. New entrants have not "voluntarily" accepted those UNE provisions any more than the ILECs have "voluntarily" accepted the FCC's UNE rules. Therefore, Bell Atlantic's provision of UNEs pursuant to interconnection agreements with new entrants in New York has been, and still is, fully subject to Section 251(c)(3) and the Commission's UNE rules.

The record in this proceeding shows without dispute that throughout 1999 Bell Atlantic has been providing UNEs pursuant to interconnection agreements in violation of the Commission's rules and Section 251(c)(3). As CompTel documents in its comments (at 4-10), Bell Atlantic has imposed unlawful restrictions on two different types of UNE combinations – the UNE platform and the enhanced extended link ("EEL"). As regards the UNE platform, Bell Atlantic has refused to provide it to business customers in certain instances and imposed unlawful sunset provisions. As regards the EEL, Bell Atlantic has imposed unlawful use restrictions to ensure that EELs are available only for primarily local traffic. These restrictions constitute an unambiguous violation of Section 251(c)(3), as well as the four Commission rules noted above.

This is not a case where Bell Atlantic has engaged in isolated cases of misconduct, or where it is uncertain what restrictions are imposed by Bell Atlantic on UNE combinations. These restrictions represent Bell Atlantic's policy toward all requesting carriers in New York, as reflected in its New York State Tariff 914. Bell Atlantic acknowledged these restrictions in its application to the FCC and in its April, 1998 pre-filing statement in New York. *See* Bell Atlantic Brief at 32 & n.10; Pre-Filing Statement of Bell Atlantic-New York at 8-9, Case No. 97-C-0271 (filed April 6, 1998). The question the Commission must address and resolve before it can permit Bell Atlantic to enter the New York interLATA market is whether Bell Atlantic has fully implemented its obligation to make UNEs available to requesting carriers on a non-discriminatory basis as required by the Commission's rules and the governing statute when Bell Atlantic has provided UNEs to carriers prior to and after filing its application pursuant

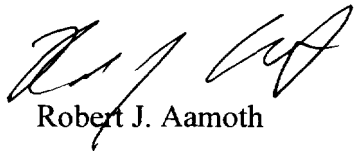
to a tariffed corporate policy that discriminatorily restricts the availability and use of UNE combinations, including the platform and EELs.

Any possible doubt that Bell Atlantic's UNE platform restrictions were unlawful at the time it filed the application was removed by the Commission's *Third Report and Order* in CC Docket No. 96-98. In that decision, the Commission confirmed that it is patently illegal under Section 251(c)(3) for Bell Atlantic to withhold the UNE platform from business customers under its current corporate policy. That is not a new policy that takes effect with the *Third Report and Order*, but a binding interpretation of Section 251(c)(3) as it applies to the provision of UNEs by Bell Atlantic throughout 1999.

Further, CompTel notes that the *Third Report and Order*, as modified, held on an interim basis that requesting carriers may obtain EELs if they are used for a "significant amount" of local traffic, while reserving to a subsequent rulemaking proceeding the issue whether any local traffic limitations are lawful. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370, rel. Nov. 24, 1999 (Supplemental Order). Without expressing any opinion in this letter as to whether Bell Atlantic's "primarily local" standard for EELs in New York is consistent with the Commission's interim "significant amount" standard, CompTel submits that any use restrictions, even as interim rules, are inconsistent with Section 251(c)(3) and the Commission's rules that were in effect when Bell Atlantic filed the application. Bell Atlantic's facile statement that it will comply with the *Third Report and Order* when it becomes effective cannot wipe away the stain of Bell Atlantic's ongoing statutory and rule violations throughout 1999. Certainly, the Commission cannot conclude that Bell Atlantic has fully satisfied the UNE checklist item, as Congress directed the Commission to do, without resolving whether the restrictions imposed by Bell Atlantic on the UNE platform and EELs during 1999 are consistent with Section 251(c)(3) and the Commission's pre-existing UNE rules.

Therefore, assuming without conceding that the Commission finds Bell Atlantic's application otherwise suitable for grant (a finding with which CompTel disagrees), the only lawful options available to the Commission are to reject Bell Atlantic's application, or to require Bell Atlantic to file a supplemental compliance plan after correcting these illegal restrictions and then re-start the 90-day review period under the statute.

Sincerely,



Robert J. Aamoth

cc: Larry Strickling
Carol Mattey